

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

GRANE HEALTHCARE CO. AND/OR EBENSBURG
CARE CENTER LLC T/D/B/A CAMBRIA CARE
CENTER

and

LOCAL UNION NO 1305, PROFESSIONAL AND
PUBLIC SERVICE EMPLOYEES OF CAMBRIA
COUNTY A/W THE LABORERS' INTERNATIONAL
UNION OF NORTH AMERICA

and

GRANE HEALTHCARE CO. and/or EBENSBURG CARE
CENTER LLC t/d/b/a CAMBRIA CARE CENTER

and

SEIU HEALTHCARE PENNSYLVANIA, CTW, CLC

Consolidated Case Nos.

6-CA-36791

6-CA-36803

6-CA-36915

**RESPONDENTS' BRIEF IN SUPPORT OF EXCEPTIONS
TO THE DECISION AND RECOMMENDED ORDER
OF THE ADMINISTRATIVE LAW JUDGE**

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RESPONDENTS' BRIEF IN SUPPORT OF EXCEPTIONS

Respondents Grane Healthcare Co. (“Grane”) and/or Ebensburg Care Center, LLC t/d/b/a Cambria Care Center hereby submit their Brief in Support of Exceptions to the Decision of the Administrative Law Judge with respect to consolidated cases 6-CA-36791, 6-CA-36803, and 6-CA-36791.

I. STATEMENT OF THE CASE

The parties entered into a stipulation addressing many of the operative facts necessary to provide the context in which this case arose. That stipulation was entered into evidence as Joint Exhibit (JX) 2.¹ Other facts necessary for full consideration of Respondents’ exceptions will be detailed in the supporting arguments.

For many years before January 1, 2010, Cambria County – a political subdivision of the Commonwealth of Pennsylvania – owned and operated a nursing home known as Laurel Crest Nursing and Rehabilitation Center. The people who worked at Laurel Crest were public employees. The labor law governing the relations between the County and its workforce was Pennsylvania’s Public Employee Relations Act (“PERA”), 43 Pa.C.S.A. §1101.101 *et seq.* Under the auspices of the PERA, the workforce at Laurel Crest was organized into two units: one, represented by Charging Party Local Union No. 1305, Professional and Public Service Employees of Cambria County, affiliated with The Laborers’ International Union of North America (“Local 1305”) was certified by the Pennsylvania Labor Relations Board (PLRB) as the collective bargaining representative under the PERA for a unit of non-professional employees working at

¹ References to the Exhibits received into evidence at the trial before Administrative Law Judge David Goldman will be designated in the following fashion: the exhibits proffered by the General Counsel are designated “GCX”, those proffered by Respondents are designated “RX”. Joint Exhibits are labeled “JX”. Exhibits submitted by the SEIU are denoted “SEIUX.” References to the seven volumes of transcript will be in the form “Tr. Vol. [number] at [page number].”

Laurel Crest. A predecessor of SEIU Healthcare Pennsylvania (“SEIU”) was certified by the PLRB “for purposes of meeting and discussing” in a unit of “professional and nonprofessional first level supervisors ... including staff RNs [and] Charge LPNs” Joint Exhibit (JX) 2, ¶¶1-3, 48, 49.

Effective January 1, 2010 Cambria County sold Laurel Crest to entities affiliated with Respondents in this matter. Ebensburg Care Center, LLC d/b/a Cambria Care Center operates the former Laurel Crest facility which is now known as Cambria Care Center, while Ebensburg Associates, LLC owns title to the real estate. Officials of Respondent Grane Healthcare Co. established both of these entities to consummate the purchase of Laurel Crest from Cambria County. On January 1, 2010 Cambria Care Center commenced operation as a nursing home. It is undisputed that a majority of the workforce employed by Cambria Care Center was formerly employed by Cambria County, and that Cambria Care Center’s management staff is comprised of individuals who held similar positions working for the County. JX 2, ¶¶15-42.

Both Local 1305 and SEIU demanded that Grane and Cambria Care Center recognize them as collective bargaining representatives under Section 9 of the National Labor Relations Act (the “Act”). Grane and Cambria Care Center declined. JX 2, ¶¶43-46. The unions filed charges with Region 6 claiming that Respondents were a single employer with a successor’s obligation to recognize and bargain with them. Charges were also filed alleging violations of Section 8(a)(3) on behalf of five former employees of Cambria County – Mark Mulhearn, Sherry Hagerich, Beverly Weber, Joseph Billy and Roxanne Lamer – asserting claims that they were not hired by Respondents because of their activities on behalf of Local 1305 (Mulhearn, Hagerich, Weber and Billy) and SEIU (Lamer).

Respondents answered the subsequently issued complaints, denying that they constitute a single employer, denying that they are successors to Cambria County and denying that they violated Section 8(a)(3) with respect to any of the five alleged discriminatees. Trial of the case was conducted over two periods in July and August, 2010. Judge Goldman issued his Decision and Recommended Order (“ALJ Decision”) on December 16, 2010. An unopposed request to extend the due date for the filing of exceptions to January 28, 2010 was granted.

Respondents herewith submit this brief in support of their concurrently filed Exceptions to the Decision and Recommended Order. Respondents renew their argument that *Burns/Fall River* successorship principles have no application to situations such as that presented here, involving a transaction from a public employer not covered by the Act to a private employer which is subject to the jurisdiction of the Act. Instead, the proper analytical approach is to view the transaction as one which creates a question concerning representation, and to resolve that question in accordance with the Section 9 procedures. With respect to the Judge’s decisions on the Section 8(a)(3) claims, he engaged in a selective parsing of the evidence, failing in his obligation to consider the record as whole. His decisions on these claims are not supported by a clear preponderance of the evidence and must be reversed. Respondents further maintain that they are not a single employer, inasmuch as control of the day-to-day operations of the Cambria Care Center, which the case law instructs is the essential determinant to the separate/single employer analysis, is committed to the management of Cambria Care Center without undue influence from Grane. Respondents therefore urge that to the extent the Judge found against them, his findings be reversed and that the Complaints be dismissed.

II. RESPONDENTS ARE NOT SUCCESSORS TO CAMBRIA COUNTY

A. Overview of Respondents' Position on the 8(a)(5) Claim of Successorship²

Resolution of the successorship issue presented here turns on whether the Act permits the Board to find an unfair labor practice under section 8(a)(5), 29 U.S.C. §158(a)(5), when an employer refuses to recognize and bargain with a labor organization that has never been certified by the Board nor voluntarily recognized by an “employer” as defined by the Act. The issue, in other words, is whether the General Counsel’s policy of applying *Burns/Fall River*³ successorship principles to transactions involving the transfer of an ongoing operation by a public entity to a private buyer is permitted by the language of the National Labor Relations Act and by Board precedent. Respondents contend that it is not. Rather, as is shown below, such a transaction presents a question concerning representation that must be resolved under the Act and Board precedent through representation proceedings under section 9, not through unfair labor practice litigation under section 8(a)(5).

Respondents acknowledge that the Board has accepted the General Counsel’s theory that *Burns/Fall River* analysis should be applied in this context. Respondents urge the Board to revisit the issue because the General Counsel’s position is wrong both as a matter of statutory construction and as a matter of policy. We demonstrate that error by examining the precedent applying successorship principles to public-to-private transactions, showing that such precedent is not well-grounded in the Act, because it derives from nothing more than a single ALJ’s assertion that to find otherwise is against the policy of the Act. Next, we show how the erroneous application of *Burns/Fall River* analysis to public-to-private transactions is inconsistent with the

² The corresponding exceptions to this issue are contained in Respondents’ Exceptions to the ALJ’s Decision #1-18.

³ *N.L.R.B. v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972); *Fall River Dyeing & Finishing Corp. v. N.L.R.B.*, 482 U.S. 27 (1987)

Board's approach, affirmed by the Supreme Court, in the equivalent context of a union's initial demand for recognition under the Act. Finally, we show how the General Counsel's application of successorship principles to cases of this type has led and will lead to the Board grappling with state law issues that are beyond what Congress intended, outside its jurisdiction and fundamentally unnecessary to the efficient administration of the Act. The Judge's finding that Respondents owed a duty to recognize and bargain with Local 1305 is accordingly incorrect, and should be reversed.

B. Successorship in Context

The vitality of the Board's jurisprudence on successorship stems from the authority of the Supreme Court's decisions in *Burns* and *Fall River*, which approved in certain aspects the Board's successorship theory, but only in the context of transactions involving "employers" as defined by the Act. In *N.L.R.B. v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972), the Court held that Burns, as a successor employer, was obligated to recognize and bargain with the union that had been certified "after a National Labor Relations Board (Board) election as the exclusive bargaining representative of [its predecessor's] employees less than four months earlier." 406 U.S. at 274. The Court acknowledged that its resolution of the issue "turns to a great extent on the precise facts involved here." *Id.*

In *Fall River Dyeing & Finishing Corp. v. N.L.R.B.*, 482 U.S. 27 (1987) the Court clarified its *Burns* holding by explaining that successorship status does not turn so much on proximity to a Board election, but instead on the union's status under the Act:

We now hold that a successor's obligation to bargain is not limited to a situation where the union has been recently certified. Where, as here, the union has a rebuttable presumption of majority status, this status continues despite the change in employer. And the new employer has an obligation to bargain with that union so long as the

new employer is in fact a successor of the old employer and the majority of its employees were employed by its predecessor.”

482 U.S. at 41 (footnote omitted). Here, the Judge grounded his decision on the “presumption of majority support” mentioned by the *Fall River* Court, ALJ Decision at 10, while ignoring the important *caveat* that such support imposes legal obligations only “so long as the new employer is in fact a successor of the old employer.” This was error.

In *Burns* and *Fall River* there was no question that the unions had obtained majority support in bargaining units employed by “employers” under the Act; the public-to-private issue was not present. Here, neither Local 1305 nor SEIU has ever been certified by the Board or recognized by Respondents, nor did they ever represent employees of an employer subject to the National Labor Relations Act. *Burns/Fall River* successorship doctrine is premised on the existence of a collective bargaining obligation under the Act, established between an “employer” and a “labor organization” as defined by the Act. The obligations sought to be imposed through successorship here had their origins under state law applicable to entities which by the Act’s own terms were neither “employers”⁴ nor “labor organizations.”⁵ The Board’s jurisdiction extends only to the prevention of “any unfair labor practice (listed in section 8) affecting commerce.” 29 U.S.C. §160(a). Section 8(a)(5) makes it an unfair labor practice for an employer “to refuse to bargain collectively with representatives of his employees, subject to the provisions of section 9(a).” *Id.* §158(a)(5). Section 9(a), in turn, establishes that the properly designated employee representative obtains exclusive status only in “a unit appropriate”⁶ for collective bargaining.

⁴ Section 2(2) of the Act excludes from the definition of “employer” “any State or political subdivision thereof” 29.U.S.C. §152(2).

⁵ With respect to Cambria County, which was not an employer, neither Local 1305 nor SEIU were “labor organizations,” since they did not exist “for the purpose, in whole or in part, of dealing with employers” 29 U.S.C. §152(5).

⁶ Respondents have maintained throughout that the claimed SEIU unit is inappropriate on its face. *E.g.* Answer to Consolidated Complaint, Case Nos. 6-CA-36803 & 6-CA-36915, at ¶¶15-16. Respondents stipulated that the unit

Neither Local 1305 nor SEIU have ever been certified or recognized by an “employer” under 9(a), yet it is has been found by the Judge that Respondents have an obligation to recognize and bargain with Local 1305. Imposition of successorship obligations in these circumstances ignores the jurisdictional limitations that Congress imposed in the Act. The Board does not have the ability to ignore the limitations on its authority that are both explicit and implicit in the terms of the Act. *Cf. Leedom v. Kyne*, 358 U.S. 184 (1958). *Civil Service Employees Association, Local 1000 v. N.L.R.B.*, 569 F.3d 88, 91-92 (2nd Cir. 2009).

The General Counsel contends of necessity in this case that labor organizations can attain the necessary “rebuttable presumption of majority status” through operation of state law – in this case, the PERA. The Judge accepted the General Counsel’s position with respect to Local 1305. ALJ Decision at 10. There is, however, no statutory basis for such a contention, and indeed the Board has heretofore in some cases rejected arguments that it should defer to state-administered resolutions of representational issues. *E.g., Albert Einstein Medical Center*, 248 N.L.R.B. 63 (1980); *Mental Health System of Boulder County, Inc.*, 222 N.L.R.B. 901 (1976); *Malcolm X Center for Mental Health, Inc.*, 222 N.L.R.B. 944 (1976). *But see Cornell University*, 183 N.L.R.B. 329, 334 (1970).⁷

The previous employer in this case – Cambria County – was and remains statutorily excluded from coverage by the National Labor Relations Act. The unions enjoyed whatever status they had while Cambria County operated the facility by virtue of state law, the Public

which Local 1305 claims to represent would be appropriate under the Act, JX2 at ¶9, but inasmuch as the Board has recently acknowledged its obligation “to continually evaluate whether its decisions and rules are serving their statutory purposes” and solicited briefs on the composition of appropriate units for collective bargaining in long-term care facilities, *Specialty Healthcare and Rehabilitation Center*, 356 N.L.R.B. No. 56 (Dec. 22, 2010), the continued vitality of that stipulation is in doubt. Moreover, as is addressed in the text *infra* at pp. 18-20, the fact that the composition of the bargaining units claimed by the unions is or may be at issue demonstrates in this context the inutility of litigation under Section 8(a)(5) as a method of determining rights under Section 9.

⁷ It is noteworthy that *Cornell University* and the cases it relies on all predate *Linden Lumber Division, Summer & Co.*, 190 N.L.R.B. 718, 721 (1971), the import of which is discussed *infra* at pp. 18-20.

Employe Relations Act, 43 Pa.C.S.A. §1101.101 *et seq.*, and had no rights at all under the National Labor Relations Act. The unions do not have a “rebuttable presumption of majority status” because they had no status at all under the Act before the sale of Cambria County’s Laurel Crest facility to Defendants. Respondents have been placed into the metaphysical quandary of being the successor to a non-existent predecessor.

1. The successorship doctrine applied to public-to-private transactions has no statutory basis.

Judge Goldman was constrained by Board precedent from accepting Respondents’ argument. He recites two decisions as authority for rejecting the argument that successorship obligations should not be imposed as a consequence of the transfer of public operations to a private employer: *Lincoln Park Zoological Society*, 322 N.L.R.B. 263 (1996), *enf’d.*, 116 F.3d 216 (7th Cir. 1997) and *JMM Operational Services, Inc.*, 316 N.L.R.B. 6 (1995). These cases, however, did not arise in a vacuum, but instead represent the perpetuation of analytical errors and unwarranted assertions that began in the mid-1970s and remain uncorrected to date.⁸

Examination of the origin of the application of successorship principles to public-to-private transactions like the one at issue here demonstrates the absence of a statutory basis for the doctrine. The Board’s policy of applying *Burns/Fall River* successorship principles to transactions involving sale by a public entity to a private buyer is not contemplated by the

⁸ It appears that there is only one decision of the Board is actually precedential on the successorship issue presented in this case, and it is of dubious legitimacy. Of the cases discussed in this section of Respondent’s argument, only the decision in *JMM Operational Services*, 316 N.L.R.B. 6 (1995) is precedential. As is discussed extensively in the text, in *JMM* the ALJ concluded that a private entity could be a successor to a public employer by relying on *Base Services, Inc.*, 296 N.L.R.B. 172 (1989) and *Harbert International Services*, 299 N.L.R.B. 472 (1990). An exception to this finding was filed by JMM, and the Board, after reviewing the exception, adopted the finding and rationale of the ALJ. 316 N.L.R.B. at 6 & n.3. But neither *Base Services* nor *Harbert* provides an adequate foundation for the *JMM* ALJ’s holding. In both cases, as is discussed more fully in the text, the conclusion that a private entity was a *Burns* successor to a public employer was never addressed by the Board, and thus never became precedential through Board adoption; in fact, in each case the finding of successorship was overturned by the Board. Every case addressing the successorship issue in this context subsequent to *JMM* cites *JMM* or its progeny for the proposition that a private entity can be a successor to a public employer.

language of the National Labor Relations Act. The cases that have considered the issue have simply assumed that the statute supports the desired result. A review of those cases reveals that the decisions are devoid of any analysis of or citation to the Board's authority to impose successorship obligations in this context.

The first case to directly address the successorship doctrine in the public-to-private context was *Base Services, Inc.*, 296 N.L.R.B 172 (1989). Base Services, a private company, took over operations previously performed in a logistics division of the U.S. Army and declined to recognize a union that represented certain civilian Army employees at the base. The Administrative Law Judge ("ALJ"), Judge Cates, found that the private employer (Base Services) was a successor, despite the fact that its predecessor was the federal government. Judge Cates simply declared that the "Board is not precluded from finding that successorship status exists simply because the predecessor is not covered by the [NLRA]." *Id.* at 175. His opinion about whether the Board is precluded from finding successorship says nothing about whether it is legally empowered to so find.

In apparent support of this proposition, and without any further discussion, Judge Cates cited *Boeing Co.*, 214 N.L.R.B. 541, 548, 559 (1974).⁹ The citation to *Boeing* (another ALJ decision simply affirmed by the Board) was made with the signal *cf.*¹⁰, but there was no further discussion of the case's applicability to the proposition for which it was cited. Judge Cate's pinpoint citations to the *Boeing* decision, moreover, do not actually establish the proposition.

⁹ *Boeing* was decided on November 1, 1974. The Supreme Court's *Burns* decision issued on May 15, 1974. It is therefore evident that neither the Board nor the courts had any meaningful opportunity to develop or refine the successorship doctrine in the interim.

¹⁰ The Harvard Blue Book describes the use of *cf.* as signaling that the "cited authority supports a proposition different from the main proposition but sufficiently analogous to lend support. Literally, "*cf.*" means "compare." The citation's relevance will usually be clear to the reader only if it is explained." A Uniform System of Citation, 17th ed., (Harvard Law Review Association, 2000), at p. 23. Judge Cates did not provide further explanation of the significance of *Boeing*.

Page 548 of the *Boeing* decision sets forth only: 1) the ALJ’s recitation of the organizational hierarchy of the International Association of Machinists, the charging party (“The IAM and Its Subordinate Units”); 2) the commercial contractual relationships between TWA, Boeing and NASA, and the origin of the contractual relationship between the IAM and the two contractors, revealing that IAM’s status as bargaining representative for employees of TWA was pursuant to the Railway Labor Act, while its status for Boeing’s employees was secured under the National Labor Relations Act; and 3) that Boeing submitted a bid to replace TWA as contractor for certain services performed for NASA. 214 N.L.R.B. at 548. At page 559, the *Boeing* ALJ discusses successorship factors such as continuity of operations and employment, but simply concludes without explanation that the fact that “the systemwide TWA-IAM contract was governed by the Railway Labor Act would **not vitally impede** the holding of Boeing’s successorship in view of the factors already noted, and since the Board’s jurisdiction and application of the Act’s provisions are clear.” *Id.* at 559 (emphasis supplied).¹¹ *Boeing* does not explain how the successorship doctrine can apply when the predecessor was a not an “employer” within the meaning of the Act.

Later in his *Base Services* opinion, Judge Cates opined that, despite the public-to-private nature of the transaction, imposition of successorship

fulfills the purposes of the Act by fostering stability and harmony in labor relations for an employer (Base) who is covered by the Act and which renders services to a customer (the Army) that directly affects national defense. To fail to apply the traditional successorship test in the instant case, merely because the predecessor was from the public sector, would place form over the substantive goals of the Act.

296 N.L.R.B. at 177. Judge Cates’ focus on the policy of the Act ignores the statutory language; the “stability and harmony in labor relations” only became a “purpose of the Act” when Base

¹¹ But see *Atlantic Technical Services Corp.*, 202 N.L.R.B. 169, 170 (1973) where the Board listed the fact that the predecessor “was regulated under the Railway Labor Act” as a factor disfavoring a finding of successorship.

Services began operations, not before. His conclusion – that the predecessor public employer’s exemption from the NLRA did not affect his finding that Base Services, a private company, was a successor – is not based on any analysis other than his own personal belief that such facts did not “vitally impede” application of the successorship doctrine, which is another way of saying that the law should not trump the desired outcome. *Id.* Left unexamined by Judge Cates is how the policy of the Act is fulfilled when it is applied to circumstances that are by the express language of the Act excluded from its coverage.

Even more remarkable, given the subsequent jurisprudence that Judge Cates’ decisions spawned, the Board reversed his decision in *Base Services* and determined that as a factual matter Base Services was not a successor because it did not hire a majority of the formerly public employees that were represented by the union. 296 N.L.R.B. at 173. The Board therefore did not address the *legal* issue of whether Base Services, as a private entity, could ever be a successor to a public employer because such an analysis was unnecessary to its holding.

In a similar case the following year, *Harbert International Services*, 299 N.L.R.B. 472 (1990), Judge Cates also found successorship and the Board once again reversed him. As in *Base Services*, *Harbert* involved civilian Army employees and a private takeover at the same Missouri military base. Cates relied on the same *Boeing* reference and identical “form over substantive goals” “approach”, and was once again reversed by the Board because the alleged successor had not hired a majority complement. 299 N.L.R.B. at 476, 480.

Hence, in both *Base Services* and *Harbert*, the evidence showed that as a factual matter the private purchasers were not successors of the public employer predecessors because the formerly public employees did not constitute majorities at the new private enterprises. Yet Judge Cates’ rationale has never been critically examined by the Board. Instead, it has become the

jurisprudential and intellectual foundation of the successorship doctrine applied in public-to-private transactions.

Judge Cates' analysis, facile though it is, was next applied in *JMM Operational Services, Inc.*, 316 N.L.R.B. 6 (1995), where a city in Illinois outsourced its wastewater treatment facility to JMM, a private company. Before the transaction, the city employees were represented by a union under state law. JMM refused to recognize the union, a charge was filed and a complaint alleging a violation of §8(a)(5) was litigated. JMM argued that it could not be a successor because the former employer was a political subdivision of Illinois, rendering application of the successorship doctrine inappropriate. 316 N.L.R.B. at 11. The ALJ rejected this argument and relied on *Base Services*, including Judge Cates' *Boeing* reference and "form over substantive goals" approach to the issue and found JMM to be a successor-employer. *Id.* at 13. The Board adopted this conclusion without further consideration or examination of how the substantive goals of the Act are accomplished by imposing legal obligations derived from the Act on a successor when its predecessor did not have them. 316 N.L.R.B. at 6 & n.3.

In *Lincoln Park Zoological Society*, 322 N.L.R.B. 263 (1996), *enforced*, 116 F.3d 216 (7th Cir. 1997), a private fund-raising organization, the Society, took over operations of a city zoo in Illinois. Former city employees were represented by a union pursuant to state law. In administrative proceedings, the Society did not dispute application of the successorship doctrine even though the former employer was excluded from coverage by the Act as a political subdivision. *See* 322 N.L.R.B. at 265 (citing *JMM Operational Services*). The ALJ determined that the Society was a successor with an obligation to bargain. The Board adopted the ALJ's conclusion. At oral argument before the Seventh Circuit, counsel for the Society raised for the first time the public-to-private issue. The court acknowledged that this was an "an apt point" but

refused to consider it further because the Society had failed to appeal the Board's finding of successorship, 116 F.3d at 220, and as a consequence the Seventh Circuit enforced the Board's order.

In *Macomb-Oakland Regional Center, Inc.*, Case No. 7-CA-38775, 1998 WL 1985001 (ALJ Opinion), a Michigan state agency established a nonprofit corporation, Macomb-Oakland Regional Center, Inc., ("MORC") to privatize services to the developmentally disabled. A union representing the formerly public employees demanded recognition when it became "perfectly clear" that MORC planned to retain a majority of the agency employees. 1998 WL 1985001 at 5. MORC refused to bargain. The ALJ cited *Lincoln Park* for the proposition that "the Board has asserted jurisdiction over, and ordered bargaining for, a private non-profit successor whose predecessor was a public sector employee which fell under [state labor law]," *id.* at 6, and concluded that MORC was indeed a successor employer under the Act. *Id.* at 11.

In *Van Lear Equipment, Inc.*, 336 N.L.R.B. 1059 (2001), a Pennsylvania school district contracted with a private company to provide bus transportation services. The Board held that the private company was a successor, obligating it to bargain with a union representing the school district's former drivers. The company did not raise the public-to-private issue, instead raising arguments relating to appropriateness of the bargaining unit and substantial continuity between workforces. 336 N.L.R.B. at 1062. The Board rejected these contentions and, in a single sentence without further elaboration, relied on *Lincoln Park* and *JMM Operational Services* to conclude that "the successorship doctrine continues to apply even though the predecessor, [school district], is a public employer." *Id.* at 1064.

In *Community Hospitals of Central California*, 355 N.L.R.B. 1318 (2001), *enf'd.*, 335 F.3d 1079 (D.C. Cir. 2003), a private employer assumed control of a county hospital in California.

The ALJ relied on *Lincoln Park* to apply the successorship doctrine despite the public-to-private nature of the transaction. 355 N.L.R.B. at 1332 and the Board affirmed. On appeal the private employer argued that “the change from public to private management” was a factor cutting against the Board’s finding of “substantial continuity” between the enterprises. 335 F.3d at 1083. The D.C. Circuit nevertheless upheld the Board’s order, stating conclusorily that “[t]he change from public to private ownership of the hospital does not undermine the Board’s finding that [the private employer] was a successor.” *Id.* at 1084.

In *Siemens Building Technologies, Inc.*, 345 N.L.R.B. 1108 (2005), the Monroe County government in New York sold a coal-fired power plant to a nonprofit private entity, Monroe Newpower Corporation. The ALJ found Monroe Newpower to be a successor, citing *Lincoln Park*, and rejecting the contention that the union had lost majority support. The Board affirmed the successorship finding on this basis. 345 N.L.R.B. at 1109.

In *Morris Healthcare & Rehabilitation Center, LLC*, 348 N.L.R.B. 1360 (2006), an Illinois county Board of Supervisors transferred operations of a nursing home to Morris, a private entity. Morris leased the business of the nursing home from the county; the operations continued basically unchanged and a majority of the Morris employees were former county employees. The ALJ found that Morris was a “perfectly clear” successor “even though the predecessor was, like [county], a public employer,” based on *JMM Operational Services*. 348 N.L.R.B. at 1367. The Board adopted the ALJ decision that imposed successor obligations on Morris.

In *Dean Transportation, Inc.*, 350 N.L.R.B. 48 (2007), *enf’d.*, 551 F.3d 1055 (D.C. Cir. 2009), a private company, Dean Transportation, took over bus transportation for a Michigan public school district. Dean Transportation refused to recognize a union that represented the formerly public employees, and instead recognized the union that had represented bus drivers at its

other facilities. The ALJ applied the *Burns/Fall River* test, acknowledging only that “[t]he Board has applied this test even where, as here, the predecessor is a public entity.” 350 N.L.R.B. at 58. The ALJ did not elaborate and instead cited *Van Lear, Community Hospitals, Lincoln Park, and JMM Operational Services*. The Board adopted the ALJ’s conclusion that Dean Transportation was a successor.

On appeal, the D.C. Circuit enforced the decision of the Board. Counsel for Dean Transportation raised the public-to-private issue at the administrative level and again in its appellate brief to the D.C. Circuit. Initially, counsel for Dean Transportation focused on the general differences between public and private employment, arguing that these differences precluded a finding of substantial continuity between enterprises because the now-private sector employees were subject to a different statutory scheme than they were as public employees. 551 F.3d at 1062. On appeal to the D.C. Circuit, Dean Transportation also emphasized that the now-private sector employees “will have a right to ‘strike’ under the NLRA, a right that was unavailable to them as public employees under Michigan law.” *Id.* at 1063. The court refused to address this right-to-strike argument because Dean Transportation failed to raise it at the administrative level. Instead the court reaffirmed the ALJ, who “correctly noted” that the Board has applied the *Burns/Fall River* successorship test even where the predecessor is a public entity. *Id.* (citing *Dean*, 350 N.L.R.B. at 58 (citing *Community Hospitals, Lincoln, JMM Operational Services* and *Van Lear*)). Dean Transportation apparently did not argue that the Act could not be interpreted in the manner advanced by the Board.

Thus, as the doctrine has evolved in the context of public-to-private transactions, there has been reliance on the rationale of Judge Cates’ rejected decisions in *Base Services* and *Harbert* – both of which were reversed by the Board – ignoring the statutory exclusions from coverage of the

pre-transaction public entities in order to find violations of the Act premised solely on legal relationships created and recognized by state law. In many cases, complaints about the inappropriateness of unit determinations made under state law were summarily dismissed, in derogation of the Board’s responsibility under Section 9 to determine bargaining units that comport with the policies of the Act. There is no legal or policy justification that supports these outcomes.¹² The entirety of the Board’s jurisprudence addressing the application of *Burns/Fall River* successorship rules to public-to-private transactions of the type at issue here derives from the critically unreviewed opinion of a single Administrative Law Judge in the *Boeing* case writing in 1974 – which decision is at least in part contradicted by an earlier case arising under similar facts, *see supra* n.11 – as interpreted by Judge Cates in *dicta*, and the subsequent error cascade caused by repeated citation to and reliance on Judge Cates’ opinions. For the reasons discussed above, *Boeing*, *Base Services*, *Harbert* and their progeny are not derived from a careful – or in fact any – analysis of the statutory obligations of the parties in these types of transactions, but instead represent a results-oriented, *post hoc* approach to enforcement of the Act. Judge Cates’ rationale in *Base Services* and *Harbert* states plainly that the fact that the statutory language does not support application of successorship principles should not “vitaly impede” its application. A clearer statement of willful infidelity to the law and legal reasoning is difficult to imagine.

2. Successorship applied in the context of public-to-private transactions is inconsistent with *Linden Lumber*.

In *Linden Lumber Div., Summer & Co.*, 190 N.L.R.B. 718 (1971), the Board remarked how “[t]he facts of this case demonstrate the difficulties of attempting to interpret and apply Section (8)(a)(5) of the Act to situations where the Union’s majority status has not been established

¹² See *Albert Einstein Medical Center*, 248 N.L.R.B. 63 (1980) and its antecedents, some of which are listed *supra* p. 7.

through our election processes” *Id.* at 720. The confounding facts presented in that case arose out of “a refusal to recognize the Union solely on the strength of its authorization cards, an abortive Board election proceeding and then a strike.” *Id.* at 719. In *Linden Lumber* the Board in its own words reassessed “the wisdom of attempting to divine, in retrospect, the state of employer (a) knowledge and (b) intent at the time it refuses to accede to a union demand for recognition.” In rejecting earlier decisions which arguably required such divination, the Board adopted a preference for objective determinations of union support in bargaining units determined in accordance with Board practice:

These considerations lead us to the conclusion that Respondent should not be found guilty of a violation of Section 8(a)(5) solely upon the basis of its refusal to accept evidence of majority status other than the results of a Board election. We repeat for emphasis our reliance here upon the additional fact that the Respondent and the Union never agreed upon any mutually acceptable and legally permissible means, other than a Board-conducted election, for resolving the issue of union majority status. By such reliance we recognize and encourage the principle of voluntarism but at the same time insure that when voluntarism fails the “preferred route” of secret ballot elections is available to those who do not find any alternative route acceptable.

Id. at 721. The primacy of elections as the method of establishing majority support was emphasized in the Supreme Court’s affirmance of the Board’s position in *Linden Lumber*, where the Court stated “[i]n terms of getting on with the problems of inaugurating regimes of industrial peace, the policy of encouraging secret elections under the Act is favored.” *Linden Lumber Div., Summer & Co. v. National Labor Relations Board*, 419 U.S. 301, 307 (1974).

The General Counsel and the unions here both have resorted to litigation to establish the unions’ right to represent employees at Cambria Care Center, eschewing the preferred mechanism of elections. *Linden Lumber’s* holding is not limited by its terms to card checks, or recognitional

strikes, or any particular method of demanding recognition. Here, the letters sent by the unions to Respondents were the initial demands under the Act for recognition by an employer subject to the Act; in the words of the *Linden Lumber* Court, the letters were their first effort toward “inaugurating regimes of industrial peace” with this employer. *Id.* “The Board itself has recognized, ... that secret elections are generally the most satisfactory – indeed the preferred – method of ascertaining whether a union has majority support.” *N.L.R.B. v. Gissel Packing Co., Inc.*, 395 U.S. 575, 602 (1969). *Cf. Dana Corp.*, 351 N.L.R.B. 434, 444 n.16 (2007)(“The preference [for elections] is not simply a matter of administrative convenience. While the text of the Act does not state an explicit preference for Board elections, we find that the election year bar and the greater statutory protections accorded to a Board-certified bargaining representative implicitly reflect Congressional intent to encourage the use of Board elections as the preferred means for resolving questions concerning representation”). The *Linden Lumber* Court endorsed the Board’s position that employers ““should not be found guilty of a violation of Section 8(a)(5) solely upon the basis of [their] refusal to accept evidence of majority status other than the results of a Board election.”” *Id.* (quoting *Linden Lumber Div.*, 190 N.L.R.B. at 721). Respondents’ position here is no different: in the absence of certification of appropriate bargaining units by the National Labor Relations Board, they should not be found guilty of a violation of Section 8(a)(5) on the basis of their refusal to accept as evidence of majority status legal relationships established by state law, among parties which were not employers, employees or labor organizations as those terms are defined in the Act.

**3. Practical considerations negate application of
Burns/Fall River in the public-to-private context.**

Two examples highlight the practical difficulties and impediments attendant to the effort to force *Burns/Fall River* principles onto transactional scenarios never anticipated by the Court.

One example arises from the facts of this case and the other is hypothetical.

SEIU and the General Counsel charged that Respondents were successors to the unit that SEIU represented while Cambria County owned the Laurel Crest facility. That unit on its face was neither a collective bargaining unit nor was it otherwise appropriate under the Act. See JX 2 ¶48. Throughout these proceedings, and in the related proceedings brought by the Regional Director under Section 10(j)¹³, Respondents have argued that, as *Linden Lumber* establishes, the issue of the SEIU's (as well as Local 1305's) status as collective bargaining representative and the appropriateness of the unit it claimed to represent were matters that should be determined after an appropriate showing of interest in a unit determination under Section 9. Instead, they have been forced to defend claims of refusal to bargain with an entity that never was a bargaining representative within the meaning of the Act, ALJ Decision at 11-12, and much time and effort was wasted at the hearing attempting to "prove" that the "meet and discuss" unit certified by the PLRB did not (or no longer) included supervisors. E.g., Tr. Vol. IV at 800-811; Vol. V at 984-1002. In light of *Linden Lumber*, and the fact that elections are the "preferred" method of resolving representational disputes, the simple notion of requiring unions which wish to take advantage of the rights conferred by the Act to establish their *bona fides* under the Act by winning an election would not work irreparable damage to the policies of the Act. Instead, it would promote the Act's policies.

¹³ *Chester v. Grane Healthcare Co., et al.*, 3:10-CV-244(KRG) (W.D. Pa).

Moreover, the successorship theory applied in the context of a public-to-private transaction disestablishes the symmetry that is a hallmark of successorship under the Act, under which the successor employer not only inherits the predecessor's relationship with its union but may also be responsible for remedying its predecessor's unfair labor practices. *E.g., Golden State Bottling Co., Inc. v. N.L.R.B.*, 414 U.S. 168 (1973). The rationale for the rule was stated by the Supreme Court as "necessary to protect the public interest in effectuating the policies of the Act." 414 U.S. at 177. Yet the rule could have no application in a circumstance like that in the present situation. Consider the hypothetical circumstance that might have arisen while the facility was owned by Cambria County: if the County had been found by the Pennsylvania Labor Relations Board to have committed an unfair labor practice under the PERA before the sale to Cambria Care, there is no authority under which either the PLRB or the NLRB could order Respondents, as "successor", to remedy it. The PERA covers only "public employers", defined as "the Commonwealth of Pennsylvania, [and] its political subdivisions ...," and expressly excludes from coverage employers covered by the National Labor Relations Act. *See* 43 Pa.C.S.A. §1101.301(1). Neither of the Respondents have ever been a "public employer," just as Cambria County has never been an "employer" within the meaning of the Act. The Board's remedial authority extends only to the prevention of "any person from engaging in any unfair labor practice (listed in section 8) affecting commerce." *Id.* (emphasis supplied). An unfair labor practice under state law is not one "listed in section 8", nor would it be one "affecting commerce." Moreover, exercise by the Board of jurisdiction to enforce a remedy issued pursuant to a state statute can in no way be said to be necessary to "protect the public interest in effectuating the policies" of the National Labor Relations Act, since the Act is wholly inapplicable to both the violation and the remedy. In short, as this hypothetical example illustrates, the Board's authority extends only to remedy ULPs as

defined by the Act, committed by entities subject to the Act's jurisdiction. Stated more broadly, the Board lacks jurisdiction to impose through successorship a bargaining relationship created before the parties to that bargaining relationship were subject to the jurisdiction of the National Labor Relations Act. The bargaining relationship sought to be enforced here was one created under state law, and application of federally crafted successorship principles should not be used to perpetuate it. It is as though the matters about which the General Counsel complains in this case occurred before the passage of the Act.

4. Practical difficulties with application of *Burns/Fall River* principles to public-to-private transactions require abandonment of the approach.

The General Counsel's fundamental assumption for advocating *Burns/Fall River* successor rules for transfers from public-to-private ownerships is that majority support for a union under a state law is a perfect analogue for such support under federal law, and should carry with it the same presumptions and legal rights and obligations. There is, however, no empirical evidence to support the assumption, and a moment's reflection at least suggests that it is counterintuitive: can it really be presumed that employees who organize under a state law that, for example, prohibits strikes and which entrusts collective bargaining disputes to binding interest arbitration would be equally enthusiastic about supporting a system that left each party to the exercise of its economic power? The facts of this case with respect to SEIU further demonstrate that the analogue is imperfect at best, and suggest as a consequence that the General Counsel's whole effort to apply 8(a)(5) to these types of cases is misguided.

The Judge remarked in his discussion of the claim that Respondents are successors to the County's "bargaining obligation" with SEIU, that "while the basis to presume majority support in the SEIU unit is sound, the question must be asked, majority support for what?" ALJ Decision at

11. Under state law, it was indisputably the case that SEIU was not a “collective bargaining representative.” *Id.* While the Judge’s resolution of the issue with respect to SEIU was correct, that resolution begs the question of whether the General Counsel’s dogged determination to apply successorship principles to public-to-private transactions needlessly embroils the parties and the Board into state-law analyses that would be best avoided by resort to the traditional methods of establishing representative status under the Act: voluntary recognition or election in an appropriate unit.

There are any number of state-law and local-law variants on the concept of unionization that the Board might be called upon to assess if, as might be anticipated, public-to-private transactions continue to be a favored mechanism for streamlining governmental operations. Respondents highlight a few examples here to emphasize that “collective bargaining” as defined by Section 8(d) of the Act is seldom recognizable as such under many state and local laws.

The diversity in the various states’ approaches to addressing public employees/employer relationships is striking, and is not limited to what “collective bargaining” means in different states’ labor relations statutes and practices. These approaches range from expressly prohibiting a labor union from entering into a union contract with a public employer, and prohibiting public employees from striking, see N. C. Gen. Stat, §§ 95-98, 95.98.1, to broadly permitting collective bargaining by all public employees, and permitting public employees to strike with limited exception for those who provide “services which may not be given up for even the shortest period of time.” *See* Alaska Stat. §§ 23.40.70; 23.40.200. For example, In Colorado, by Executive Order of the Governor, “certified employee organizations” may enter into non-binding “partnership agreements” with the state regarding certain discrete classes of state employees. *See* Colo. Exec. Ord. D 028 07 (2007).

State legislatures are not precluded from passing labor laws addressing very specific issues or perceived problems, which amplifies the diversity found in these laws. For instance, after it found that the NLRB had declined to exercise jurisdiction over employers who are licensed to operate dog and horse race tracks, the New Hampshire general court declared that employees of such (private) employers would have the right to appear before the New Hampshire Public Employee Labor Relations Board, under a subset of New Hampshire labor relations laws that apply only to such employers and their employees. *See* N.H. Rev. Stat. Ann. § 273-C:1 *et seq.*

The Minnesota legislature passed a statutory provision specifically identifying the eleven bargaining units that will be recognized for employees of the Hennepin County Medical Center. *See* Minn. St. 179A.40.

In Hawaii, the Hawaii Public Employment Relations Act prohibits collective bargaining agreements from precluding volunteer school “classroom cleaning” efforts. *See* Haw. Rev. Stat. § 89-23. However, this statutory provision implicates another statute, not found in the Hawaii PERA, which prohibits a school from participating in such activities if they would lead to the displacement of a full-time school custodian. *See* Haw. Rev. Stat. § 302A-1507. Hawaii’s labor laws also expressly protect those who do not want to join a labor union on religious grounds or because they are conscientious objectors to unionization. *See* Haw. Rev. Stat. § 89-3.5.

The categories of public employees that can engage in collective bargaining also vary greatly from state to state. With respect to how a collective bargaining group may be defined, the parameters that the states employ vary from broad and general guidance, see, e.g., Alaska Stat. § 23.40.090, to establishing distinct categories from which bargaining units may be drawn, see Neb. Rev. Stat. § 81-1373, to identifying the particular bargaining units. *See* Haw. Rev. Stat. § 89-6.

Notably, the categories delineated by the various states are different than those that have developed under the Act.

The states vary as to whether such laws should be in the hands of state or local officials, leading to further complexity. Under Kansas' Public Employer-Employee Relations Act, political subdivisions must vote to "opt in" to the controlling labor laws. *See* Kan. Stat. Ann. § 75-4321 *et seq.* Other states permit local public employers to opt out of the states' public employment labor law by enacting a local ordinance or resolution. *See, e.g.,* Fl. Ann. Stat. § 447.603; N.Y. Civ. Serv. Law, Art. 14, § 212. California (which has seven different state statutes relating to public employee labor relations) has created separate local labor relations boards for Los Angeles City and Los Angeles County. *See* Calif. Gov. Code § 3509(d). Illinois' legislature created a "local panel" to address labor relations disputes of political subdivisions in excess of 2 million people – Chicago – and a "state panel" to address all other such disputes. *See* 5 Ill. Comp. Stat. § 315/5. Nevada and Oklahoma statutes authorize the creation of labor boards to address disputes involving political subdivisions of the state, but not the state itself. *See* Nev. Rev. Stat. Ann. § 288.080 *et seq.*; Ok. Stat. Ann. § 51-200 *et seq.* In the absence of statewide legislation, Phoenix, Arizona created the Phoenix Employment Relations Board, and has adopted a labor relations ordinance more comprehensive and detailed than many states' statutory schemes. Phx. Ord. § 2-209 *et seq.* In addition, Phoenix has an ordinance addressing supervisory and professional public employees, known as the "Meet and Discuss Ordinance." Phx. Ord. § 2-223 *et seq.*

As a general matter, states limit the ability for certain types of public employees to strike. However, the various states' limitations vary greatly in who can strike, under what conditions, and for how long. Many states permit collective bargaining but prohibit public employees from striking. *See, e.g.,* Conn. Gen. Stat. § 5-279; Rev. Code Wash. Ann. 41.56.120. Some states

only permit certain public employees to strike, and only after certain specific conflict resolution provisions have been completed without success. *See, e.g.*, Fl. Stat. Ann. § 447.403; Minn. Stat. Ann. § 179A.18; Pa. Stat. Ann. § 1101.1003.

As noted above, there are many permutations among the more than 30 states that contemplate some form of “collective bargaining” between public employers and employees as to how that term is defined, interpreted, and employed. For instance, a number of states that permit public employees to engage in collective bargaining specifically identify discrete topics that can be, or cannot be, the subject of negotiation. *See, e.g.*, Nev. Rev. Stat. Ann § 288.150; Ohio Rev. Code § 4117.08; Pa. Stat. Ann. 43 P.S. §§ 1101.701, 1101.702; Vt. Stat. Ann. § 904; Rev. Code Wash. Ann. § 41.80.020; Wisc. Stat. Ann. 111.91. There are different permutations on the binding or non-binding nature of collective bargaining discussions. *See, e.g.*, Kan. Stat. Ann. § 75-4324 (those meeting the definition of “public employees” are permitted to join labor organizations to elect representative that can meet and confer with employer); Mo. Rev. Stat. § 105.510 (contemplates that the parties will meet and confer, draft agreement if one is reached, and submit it to the appropriate public body for an up-or-down vote). As noted by the Judge, Pennsylvania permits public employers to “meet and confer” with first level supervisors on matters deemed bargainable by other public employees. ALJ Decision at 11. *See* Pa.C.S.A § 1101.704.

The nuances of each states’ labor law schemes are further obscured by the fact that these state laws are also subject to interpretation by state boards and courts, which invariably influence the ways they are interpreted and applied by public sector employers and employees. In short, the General Counsel’s preferred approach of applying the successorship doctrine whenever a public employer is acquired by a private one will require the Board to analyze and apply state and local

laws in ways never contemplated by Congress, and in the words of Judge Goldman in this case, will invariably require the parties, the judges and the Board to answer a question best determined in a representation proceeding: “majority support of what?”

It is fair to suggest that Congress did not craft Section 8(a)(5) with that question in mind, which further suggests that General Counsel’s preference for litigation in these contexts is not well-founded.

III. THERE IS INSUFFICIENT EVIDENCE TO ESTABLISH 8(a)(3) VIOLATIONS¹⁴

Throughout his Decision, the Judge exhibited a too-perfect understanding of *Standard Dry Wall*, in an effort to insulate his findings from review by the simple expedient of claiming that they are based on “credibility.”

In this case too much of what the judge labels as “credibility” determinations appears to be so labeled to enable the judge to ignore contrary, and often uncontradicted evidence. The Board rejects a judge’s credibility determinations when the clear preponderance of all relevant evidence shows that his conclusions are incorrect. *Standard Dry Wall*, 91 N.L.R.B. 544, 545 (1950), *enfd*, 188 F.2d 362 (3d Cir. 1951). The Act “commits to the Board itself, not to the Board’s trial examiner, the power and responsibility of determining the facts as revealed by a preponderance of the evidence and the Board is not bound by the trial examiner’s findings of fact, but bases its finding upon a *de novo* review of the entire record. Therefore, insofar as credibility findings are based upon factors other than demeanor... the Board will proceed with an independent evaluation.” *Universal Camera Corp. v. N.L.R.B.*, 340 US 474, 494 (1951).

Likewise, the Board “is not bound by inferences drawn or conclusions reached by a trial examiner based on facts or credited testimony, as the trial examiner’s observation of demeanor

¹⁴ See Respondents’ Exceptions #19-76.

does not give him any advantage in logically evaluating such evidence.” *Lewisville Flooring Company*, 108 N.L.R.B. 1442, 1444 (1954). Ultimately, an ALJ’s credibility determinations are not binding when they are “inherently unreasonable or self-contradictory” or when they are “based on an inadequate reason, or no reason at all.” *Ona Corp. v. N.L.R.B.*, 729 F.2d 713, 719 (11th Cir. 1984). The ALJ, like the Board, is obliged to consider the record as a whole, and is prohibited from “cherry picking” only those portions that support his ultimate conclusion. Here, in keeping with his seeming predisposition to find violations of section 8(a)(3), the Judge has ignored uncontroverted testimonial and documentary evidence.

Section 8(a)(3) of the Act makes it an unfair labor practice for an employer “by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.” *See* 29 U.S.C. §158(a)(3). Here, there is no direct evidence of discrimination, so the evidentiary framework first set forth by the Board in *Wright Line*, 251 N.L.R.B. 1083 (1980) is utilized. Under the *Wright Line* framework, the General Counsel must first establish a discriminatory refusal to hire by showing that: (1) the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion *animus* contributed to the decision not to hire the applicants. *See FES (A Division of Thermo Power) & Plumbers & Pipefitters Local 520*, 331 N.L.R.B. 9, 12 (2000). *Wright Line* required the General Counsel to “show that antiunion animus was a motivating factor in the decision to not hire, and that there was at least one available opening for the applicant.” *Id.* Further, it is not enough that someone

within a company know of an individual's union activity. For antiunion animus to be considered a motivating factor in the decision not to hire, the decision-maker must necessarily harbor the animus and know of that union activity. *Vae Nortrak North America, Inc.*, 344 N.L.R.B. 249, 249 n.3 (2005); *J.S. Mechanical, Inc.*, 341 N.L.R.B. 353, 354 n.7 (2004). "The gravamen of this principle is that the actual motivation of the company decision-maker, not the objective circumstances that may or may not be known to him at the time, will determine the outcome of a case. As a result, to find a violation in this case, the Board had to conclude that the [decision-makers] knew of and relied on [each alleged discriminatees'] union activities in deciding not to hire [them]." *N.L.R.B. v. Pfizer, Inc.*, 629 F.2d 1272, 1275 (7th Cir. 1980).

The General Counsel failed to meet this burden. Review of the record as a whole shows that there was no evidence presented that would permit a finding that any agent of Respondents knew that any of the 8(a)(3) claimants were union officers or otherwise distinguished themselves with visible or vocal union support, or that the alleged discriminatees were passed over for hiring for any reason other than legitimate non-discriminatory ones. In finding that antiunion animus existed, the ALJ ignored uncontradicted evidence presented and drew inappropriate and illogical inferences in reaching his conclusion.

A. The record as a whole shows that the 8(a)(3) claimants were not hired for legitimate business reasons.

There were only two people, both acknowledged agents of Cambria Care Center, who were responsible for the decisions not to hire the five alleged §8(a)(3) discriminatees: Vivian Andrascik and Beth Lenge. Tr. Vol. II at 224. Andrascik made the decision not to hire Beverly Weber ("Weber") based on her personal observations of Weber from October through December, 2009 when Andrascik was frequently at the Laurel Crest facility preparing the computer systems

and patient accounts, Tr. Vol. III at 533-535,547, as well as on the basis of Nancy McMahon's opinion about her work performance and personal demeanor. *Id.* at 547.

Lengle, Grane's Vice President of Nursing, made the decisions not to hire each of the other alleged discriminatees - Mark Mulhearn, Roxanne Lamer, Joseph Billy, and Sherry Hagerich. Her decisions were based in large part on the impressions and recommendations about each that she received during a conversation with Rebecca Nelen, the County's former Director of Nursing at the Laurel Crest facility. Tr. Vol. II at 226-227. Lengle also had personal experience with Billy that left her with a lasting negative impression, the accuracy of which was confirmed by Sheila Knee, Billy's immediate supervisor while both were employed by Cambria County. Tr. Vol. II at 230. Although the ALJ discredited Lengle's and Andrascik's testimony, he did so ignoring evidence relating to the hiring process and the particular performance of each of the five alleged discriminatees that was essentially uncontroverted and which demonstrated the legitimate, nondiscriminatory reasons animating the decisions not to hire the five named individuals.

1. The testimony and evidence related to the detailed hiring process undertaken by Lengle went uncontradicted, and as such, the ALJ was prohibited from discrediting it purely on the basis of "credibility."

All applicants underwent a screening process, which included health screening and a criminal background check. Tr. Vol. II at 225. If an employee met those pre-employment requirements, a reference check was undertaken. To facilitate this portion of the application process, Lengle consulted with Nelen to gain additional information about the applicants. Lengle then relied upon Nelen's reference in making her final hiring decisions. *Id.* at 227.

In carrying out the hiring, it is unchallenged that Lengle did not review employee

personnel files, which contained annual evaluations of employees undertaken by Laurel Crest. *Id.* at 228. Lengle testified that during the hiring process, she sat down with Nelen, who did have access to the personnel files, and went through all potential applicants for reference.

At the hearing, when questioned in detail about that hiring process, Nelen testified that she could not specifically recall meeting with Lengle to discuss applicants. Tr. Vol. I. at 162, 172. Even when pressed by Counsel for the General Counsel, Nelen maintained only that she could not remember any particular meetings with Lengle. She **did not testify** that these conversations never occurred. Tr. Vol. I at 173. In fact, when specifically asked whether Lengle had questioned Nelen about particular applicants, Nelen responded “we may have had conversations about people. I really don’t remember details. There were a lot of people in and out, at that time, and I was having to provide a lot of information to a lot of people.” Tr. Vol. I at 175. In spite of Nelen’s admission that she “may have had conversations” and that she “had to provide a lot of information on a lot of people,” the ALJ determined that conversations with Lengle simply never took place. ALJ Decision at 25.

That conclusion cannot properly be based on the Judge’s view of Lengle’s credibility; it has no basis in the record. Nelen did not deny meeting with Lengle; if she had, then the Judge could have credited that denial. Instead, Nelen acknowledged providing information about a “lot of people” but said that she could not remember the details. The fact that Nelen is unable to recall the specifics of the conversations can not lead to the inference drawn by the Judge: that the conversations never happened. Nelen’s inability to recollect details says a great deal about her credibility (she appeared in response to the General Counsel’s subpoena); it says absolutely nothing about Lengle’s. There is no basis in the record for the Judge’s conclusion.

Further, negating the conclusion that Nelen and Lengle never discussed the work

performance of the applicants is the undisputed fact that the information contained within the personnel files corroborates much of information about job performance that Lenge testified was relayed to her by Nelen. Nelen was Lenge's only access to this information. Because the ALJ acknowledges that Lenge did not personally review the personnel files, ALJ Decision at 15, the information about which she testified¹⁵ *must* have come from Nelen, providing direct support for Lenge's testimony.

Lenge's testimony regarding the actual logistics of the hiring process was uncontradicted. Lenge testified specifically that the applicants filled out an application, undertook a physical and were screened for drugs. Tr. Vol. II. at 225. The testimony of the five alleged discriminatees corroborates this precise process. Mulhearn testified that he filled out an application and underwent a physical and drug testing. Tr. Vol. II at 383-384. Weber testified that she also completed an application and submitted to a physical and drug screen. Tr. Vol. II at 422-423. Hagerich testified that in connection with the hiring process, she filled out an application, was given a physical and drug screen and was also given a TB test. Tr. Vol. II at 456. Lamer testified that she filled out an application and underwent a physical. Tr. Vol. III at 482. Finally, Billy also testified that he completed an application for employment, as described by Lenge. Tr. Vol. IV at 776. In light of this corroboration, the ALJ's conclusion that the hiring process did not occur as Lenge testified disregards uncontroverted evidence to bolster the conclusion he favored.

Lenge's testimony about the hiring process, including her consultation with Nelen is either uncontroverted or corroborated by other sources. Therefore, under the framework established by *Standard Dry Wall*, the ALJ cannot simply discredit Lenge in light of the evidence

¹⁵ The testimony about what Lenge was told by Nelen and its relationship to the contents of the personnel files is presented, *infra*, in the discussion of evidence relating to each of the 8(a)(3) claimants.

to the contrary.¹⁶

2. The testimony and evidence demonstrates that the alleged discriminatees were not hired because of legitimate, non-discriminatory reasons, and not because of their union activities, which were unknown by the decision maker.

a. Sherry Hagerich

Lengle made the decision not to hire Hagerich based solely on Nelen's reference. Tr. Vol. II at 227. Particularly influential was Nelen's report that Hagerich's attendance was poor and that she was loud, obnoxious, and caused trouble amongst her coworkers. *Id.* In fact, when making her recommendation, Nelen said to Lengle, "Beth, in respect to the nursing staff on the first floor, you got to blow it up, and start over again." Tr. Vol. I at 177. Hagerich worked on the first floor. Tr. Vol. II at 453. Nelen denied none of this, and in fact confirmed Lengle's account by admitting that the nursing staff on the first floor including Hagerich - was "difficult." *Id.* at 177-178.

Nelen's perception of Hagerich as shared with Lengle is confirmed by Hagerich's 2005-2006 performance evaluation, in which it is noted that "Sherry could improve on her interpersonal relations. At times she comes across as being abrupt." Tr. Vol. II at 482 and RX 4. Moreover, Hagerich's 2004-2005 performance evaluations show that she was counseled for engaging in an unprofessional demeanor when addressing residents. *Id.* at 485 and RX 5.

The record is completely devoid of any evidence that Lengle knew of Hagerich's position with Local 1305 or any union activity. The ALJ found that Hagerich was president of Local

¹⁶ An ALJ may not rest his entire decision that antiunion animus motivated an employer's decision on a finding that the employer gave a pretextual reason for its action. *See, e.g., Union Tribune Publishing Co. v. NLRB*, 1 F.3d 486 (7th Cir. 1994); *Goldtex, Inc. v. NLRB*, 14 F.3d 1008 (4th Cir. 1994) at 1011 (evidence of pretext does not "enter the picture until some evidence of a discriminatory discharge has been brought forward"). Discrediting the employer's stated reason for action can lead a factfinder to "infer that there is another motive [and that] the motive is one that the employer desires to conceal--an unlawful motive--at least where, as in this case, the surrounding facts tend to reinforce that inference." *Shattuck Denn Mining Corp. (Iron King Branch) v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); *see also Jet Star, Inc. v. NLRB*, 209 F.3d 671 (7th Cir. 2000) at 678; *Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 230 (D.C. Cir. 1995). However, "[a] finding of pretext, standing alone, does not support a conclusion that [discipline] was improperly motivated," absent other evidence of animus. *Union-Tribune Publishing Co.*, 1 F.3d at 491.

1305 from 2005 through 2009, and that her name and position were posted on two bulletin boards in the facility. ALJ Decision at 36. The Judge further found that Hagerich’s photograph was on the front page of the local newspaper and that she appeared on a local television news report. *Id.* From these facts, the ALJ concludes that “Grane knew Hagerich.” *Id.*

This ultimate determination completely ignores that fact that there was no evidence that Lenge, who alone made the decision not to hire Hagerich, knew of Hagerich’s position within the Union. There is no testimony that Lenge observed the bulletin board, or that she saw the newspaper or watched the news report on television. Moreover, there is no evidence that any other Grane employee was aware of this “publicity.” The nexus between the ALJ’s recitation of how Lenge *might* have known what position Hagerich held, and Lenge’s actual knowledge is absent. Further, there is no evidence in the record that Lenge or Nelen bore any animus toward Hagerich because of her position with or activities on behalf of Local 1305. *See supra* note 16. Coupled with Nelen’s recommendation to Lenge to “blow up” the first floor nursing staff, the evidence is insufficient to support the Judge’s conclusion that Respondents violated Section 8(a)(3) by not hiring Hagerich.

b. Mark Mulhearn

Lenge made the decision not to hire Mark Mulhearn (“Mulhearn”) based solely on Nelen’s recommendation. Tr. Vol. II at 226. Nelen told Lenge that Mulhearn had poor performance evaluations, a poor attitude and attendance problems. *Id.*

Nelen’s report to Lenge is confirmed by Mulhearn’s extensive disciplinary record while working at Laurel Crest. When questioned on cross-examination about his disciplinary record, Mulhearn admitted the inaccuracy of his Affidavit, which stated, “I have not been subject to any recent discipline. My annual performance evaluations have been either normal to outstanding ... “

Id. at 406. In reality, his performance evaluations show discipline for refusing to work required overtime, *id.* at 401 and RX 1, educational counseling regarding his failure to execute some of his responsibilities with respect to patients, *id.* and RX 1, and another refusal to work overtime for which he received a one-day suspension. *Id.* at 403 and RX 1. Similarly, on June 26, 2007, he received a verbal warning for refusing to work overtime. *Id.* at 404 and RX 1. In fact, Mulhearn admitted that he received serious discipline while being employed at Laurel Crest. *Id.*

The ALJ also determined that Grane “knew” of Mulhearn’s position with Local 1305 because his name appeared on a letter sent to Grane by Local 1305’s counsel in 2009. ALJ Decision at 36. The September 11, 2009 letter shows Mulhearn copied as Local 1305’s business agent. GCX 39. Although there is no dispute that the union’s counsel sent the letter, or that it was received by Grane, there is absolutely no evidence that Lenge ever saw it or was informed that Mulhearn was identified in it. There was no testimony by Mulhearn or any Grane official or anyone that established that Lenge was ever shown the letter or was apprised of its contents. The letter is not addressed to her. In contrast, Lenge’s testimony that she did not know anything about Mulhearn’s union activity, is uncontradicted. In this regard, the ALJ’s conclusion that “Grane knew Mulhearn” is irrelevant; what would be relevant is evidence that Lenge knew Mulhearn, and there is none. The ALJ’s effort to impute knowledge to Lenge, although labeled as a credibility determination, is completely unsupported by evidence.

c. Joseph Billy

Lenge made the decision not to hire Joseph Billy (“Billy”) based on her personal observations of him and based in part on Nelen’s bad recommendation. *Id.* at 227. According to the uncontradicted testimony of Lenge, Nelen recommended not hiring Billy because of his terrible attitude toward his co-workers and responsibilities, and frequent use of foul language. *Id.*

An employer is privileged to hire the most capable, willing, and cheerful workforce it can, and ability and attitude are valid employment criteria. *See, e.g., New York Telephone*, 300 N.L.R.B. 894 (1990). Lengle stated that she personally observed Billy's attitude. *Id.* at 231. Lengle testified that when Billy handed his application to her, it was incomplete. *Id.* at 305. Billy failed to complete the section regarding his past employment history; he circled a section and wrote, "Do not agree with," and failed to sign the application. *Id.* When Lengle informed Billy that his application was incomplete, Billy stated, "That's all you're getting." *Id.* at 286. On other occasions, when Lengle asked him, "How are you?" Billy replied "well, I haven't been fired yet" and "oh be careful not to slip in the puddle of my awesomeness." *Id.* at 231. Billy confirmed making statements like this, albeit he had a different view of their significance. Tr. Vol. IV at 780-781.

Additionally, Lengle had encountered Billy years before, when Grane managed the Laurel Crest facility under contract to the County. Lengle remembered Billy from that time, and testified as to her first encounter with Billy on the loading dock at Laurel Crest. *Id.* at 285. Specifically, she recalled that Billy said, "Fuck Grane" more than once knowing that Lengle was a representative of Grane. *Id.* Billy acknowledged meeting Lengle at that time, but denied making the statement. Tr. Vol. IV at 779. Lengle further testified that she did not know Billy was a union official, then or now. *Id.* at 231.

Nelen confirmed Lengle's testimony that Billy had "bad attitude." Tr. Vol. I at 179. This testimony alone is enough to discredit the ALJ's determination that Nelen never spoke with Lengle. Specifically, Nelen testified that Billy used the Department of Health as a "sounding board for staffing issues, he was not able to get his work completed and he would say things around surveyors that were not very appropriate." *Id.* at 184. Sheila Knee told Lengle that the

nurses' aides had "bad attitudes," Tr. Vol. II at 332, and specifically singled out Billy, stating that he had a bad attitude in the way he performed his duties and interacted with residents. *Id.* at 333.

Lengle's testimony is further confirmed by Billy's extensive disciplinary record at Laurel Crest. Billy admitted on cross-examination to an extensive disciplinary record extending back six years, in contrast to his Affidavit testimony that "[I] did not have a disciplinary record, except a warning over five years ago for sick leave...." Tr. Vol. IV at 788-793.¹⁷ In reality, Billy had several disciplinary violations on his record while employed at Laurel Crest: on June 18, 2009 Billy received a written warning for refusing to work mandatory overtime. *Id.* at 789 and GCX 49. On January 6, 2009 he was "counseled" for being rude, argumentative, and unprofessional in his behavior toward the therapy staff at Laurel Crest. *Id.* and GCX 49. Again, on December 19, 2008, Billy was "counseled" for refusing overtime. *Id.* and GCX 49. On December 3, 2008, he received a verbal education session for not following a patient's care plan and for not checking a patient's activities of daily living. *Id.* and GCX 49. On July 22, 2005, Billy was "counseled" for failing to "punch in" in a timely manner. *Id.* at 791 and RX 48. Similarly, on May 31, 2005, he was counseled for failing to "punch in." *Id.* and RX 48.

The ALJ found that Billy's union sympathies and activities were well known by Grane, because in 2003, a Grane representative, Wendy McDonald, terminated a group meeting when Billy voiced concerns over a collective bargaining agreement. ALJ Decision at 36. The ALJ then concluded that because McDonald was still with Grane in 2009, Lengle somehow knew of Billy's union activities. This determination is nothing short of illogical. Not only is there no

¹⁷ Remarkably, the Judge's perception of Billy's demeanor was apparently unaffected by the significant discrepancies, even outright falsehoods, that a comparison of his affidavit and trial testimony revealed. This credulity for the General Counsel's witnesses was nearly universal; the Judge provided no explanation justifying his general rejection of the credibility of Respondents' witnesses' and his uncritical acceptance of testimony of witnesses for the General Counsel, even in the face of significant impeachment of their credibility.

evidence to support the ALJ's ultimate determination; there was no testimony that Lengle was aware of the 2003 meeting, knew what had occurred at the meeting, or knew what Billy's position on union issues was in either 2003 or 2009. Further, even if McDonald knew of Billy's position in 2003, and even if McDonald passed along this information to Lengle, there is no temporal proximity sufficient to raise an inference that the claimed protected activity – complaints about the labor agreement in 2003 to one person – motivated the refusal by a different person to hire him in 2009. *See, e.g., Neptco, Inc.*, 346 N.L.R.B. 18, 19, 20 (2005)(noting that “the timing of the discharges” occurring “several months after the Union had ceased actively campaigning” suggests “nothing” about whether the motivation was unlawful). Absent evidence supporting an inference of illegal motivation, the ALJ was precluded from finding that anti-union animus was a motivating factor in the decision not to hire Billy. *See supra* note 16.

d. Roxanne Lamer

Lengle made the decision not to hire Lamer based upon the recommendation from Nelen. According to Lengle's uncontradicted (but nevertheless discredited) testimony, Nelen stated that Lamer had bad work evaluations which specifically noted “poor performance” and as a result, Nelen recommended that Lamer not be hired. Tr. Vol. II at 252. Based on Nelen's recommendation, Lengle made the final decision not to hire Lamer. *Id.* at 226.

Lengle did not base her hiring decision on whether Lamer was a union member since Lengle had no knowledge that Lamer was a member of the union, or had engaged in union activities. *Id.* at 310. There is no evidence to suggest otherwise. In fact, Lamer herself testified that Grane personnel had no knowledge of the union's activities regarding the sale of Laurel Crest before, during or after the hiring process. Tr. Vol. III at 577. Lamer testified that in October of 2009, the union engaged in an informal picket outside of the courthouse. *Id.* When asked whether

Grane Healthcare was involved in the informal picket, Lamer stated, “There were no picket signs that had anything to do with Grane. It was all about the County.” *Id.* at 588. When asked about Grane Healthcare’s involvement during a meeting between union representatives over Laurel Crest in December of 2009, Lamer responded, “no one from Grane Healthcare was present at the meeting.” *Id.* at 589

The single significant item on which the Judge bases his finding of an 8(a)(3) violation is Lamer’s account of her trip to Pittsburgh with Nathan Williams to attempt to talk to Grane officials. Lamer described this expedition as follows: “We went to their office, we talked to the receptionist, gave them our name, and told them why we were there, the receptionist had called upstairs, there was a lady had come down and told Nathan that the gentleman he needed to talk to was busy at the time, and he would call him later, and that we had left.” *Id.* at 579. This evidence establishes nothing; Lamer had no contact with Grane representatives, and spoke only with a receptionist and an unidentified woman. Section 2(2) of the Act provides in relevant part that “[t]he term ‘employer’ includes any person acting as an agent of an employer, directly or indirectly...” 29 U.S.C. § 152(2). There is no evidence that either the receptionist or the unidentified woman were “agents” of Grane. There is no proof that either was a supervisor, or otherwise in a position of authority within the company. The conduct that the General Counsel contends imputes knowledge to the employer must be cloaked with employer’s authorization before an unfair labor practice may be found. 29 U.S.C.A. §§ 152(11), 158(a)(1) and(3); *NLRB. v. Big Three Indus. Gas & Equip. Co.*, 579 F.2d 304 (5th Cir. 1978). There is no such “cloak” here.

The ALJ then determined that Lamer’s name was “probably” written down and “probably” passed along to Oddo. ALJ Decision at 37. From his ultimate determination that Lamer was not hired based upon her union activity, we must assume that the ALJ also would “probably” find (if

he had bothered to include it in his decision) that the information that Oddo “probably” received was also then “probably” passed along to Lengle, despite Lengle’s testimony that she did not know of Lamer’s union activity. The chain of “probablys” necessary to support the Judge’s conclusion reveals it to be pure speculation. The Judge is not free to disregard uncontroverted evidence, nor can he speculate on what he thinks “probably” occurred.

e. Beverly Weber

Andrascik made the decision not to hire Weber based upon her personal observations of Weber and upon the opinion of McMahon, who worked with Weber at Cambria County from May of 2008 through December 31, 2009. Tr. Vol. II at 344. Andrascik observed that Weber was very unfriendly. Tr. Vol. III at 547. Specifically, Andrascik testified, that she “was afraid Weber’s behavior would extend to residents and families.” *Id.* Andrascik testified that McMahon opined that Weber was not a team player, she had trouble communicating with her co-workers and she had an absentee problem. *Id.* In fact, McMahon confirmed this by stating, Weber’s communication sometimes could be an issue, and “my opinion was, I wasn’t sure if she would be a team player.” Tr. Vol. II at 347. Moreover, McMahon testified that while employed by the County of Cambria, she did not know Weber was a union officer or elected official. *Id.* at 354-355.

Andrascik’s observations are confirmed by Weber’s 2006-2007 performance evaluations which noted “needs improvement in her relationship with her co-workers.” *Id.* at 435 and RX 2. Specifically, the evaluations stated that Weber “allows personal bias to affect job relationship. Requires occasional reminders regarding the needs and sensitivities of others; does not consistently adhere to Affirmative Action policy/administrative requirements.” *Id.* at 438 and RX 2. Additionally, her performance evaluations commented, “you have a tendency to become short with your co-workers. Always keep lines of communication open with your co- workers” *Id.* at

439 and RX 2. Weber also admitted that she had experienced the same criticism in her 2004-2005 performance evaluations and in her 2003-2004 performance evaluations. *Id.* at 440 and RX 3. Specifically, Weber's 2003-2004 evaluation commented, " ... in order for the office to run efficiently and smoothly, it is important for you to be a team player. Regardless of personal feelings towards others, we have to work with each other for the good of the facility." *Id.* at 441 and RX 3. In fact, during her last ten years at Laurel Crest, Weber annually received criticism from her superiors for having poor interpersonal skills with other employees. *Id.* at 443. Moreover, Weber admitted that from the period of June 29, 2008 through August 28, 2008, she was at least 34 times late for work. *Id.* Weber admitted that in 2006, she missed nine full days of work, ten partial days of work and only provided a doctor's excuse for six of those days. *Id.* at 444. Similarly, in 2005, Weber received a document from management indicating that she missed ten partial days of work, was late six times and missed seven full days of work. *Id.* In fact, on August 13, 2009, Weber received another document from management indicating that she had an absentee and tardiness problem. *Id.*

In short, everything that McMahon said and Andrascik observed was documented in Cambria County's personnel files. Beverly Weber was not hired because she was a bad employee, and everyone knew it. It was her poor reputation, legitimately earned, that was the reason she was not offered a job, not any activity on behalf of an official position with Local 1305. The ALJ bent over backward to discredit this testimony even though the record as a whole supports the testimony that Weber was simply a bad employee.

The ALJ found Andrascik's testimony problematic and discredited her explanation for not hiring Weber. ALJ Decision at 28. The ALJ focused on Andrascik's initial testimony that Weber was screened out as a result of the health screening process. *Id.* at 29. Andrascik, who was visibly

nervous during the hearing, clarified her testimony and indicated that it was the reference screening that had excluded Weber. Tr. Vol. III at 551. Andrascik testified that she had previously used the term “health screening” because the health screening process encompassed the reference checks. *Id.* at 551-553. In his Decision, the ALJ noted “...Andrascik was permitted to explain her answer – after two recesses...” ALJ Decision at 29. Counsel for Respondents remained in the courtroom during these recesses. To the extent that the ALJ is suggesting that the witness was coached, there are no facts in evidence to support this conclusion, there were no objections or protests made by any party, and the suggestion is nothing more than gratuitous evidence of the ALJ’s unwarranted bias.

Further, the ALJ determined that in 2003 Weber was the business manager for the Union and met with several Grane officials, including Andrascik, to discuss union-related issues. ALJ Decision at 36. Although Andrascik did not recall meeting with Weber in 2003, even assuming that she did, there was no testimonial or documentary evidence in the record to support the ALJ’s finding that Andrascik recognized Weber in 2009, remembered that she had once been a business manager for the Union, or knew what position, if any, she had with the union at the time of hiring. As was the case with Billy, there is the lack of temporal proximity between the protected activity and the alleged adverse action. As such, the finding of antiunion animus as a motivating factor in the decision not to hire was inappropriate. *Neptco, Inc.*, 346 N.L.R.B. at 20. The ALJ completely ignored this lack of evidence and made the unsubstantiated conclusion that because Weber once held a position, she was ultimately not hired because of it.

3. Conclusion

The testimony and evidence related to the detailed hiring process undertaken by Lengle was uncontradicted and corroborated; the ALJ was prohibited from discrediting it purely on the

basis of “credibility.” Despite the ALJ’s effort to insulate his findings from review by basing them on “credibility,” the record as a whole fails to demonstrate that the decision not to hire these five individuals was unlawful. There is an absence of any evidence that the decision makers knew of the alleged discriminatees’ union activity, and an absence of evidence that any union activity was a motivating factor in the decision not to hire these individuals. The Judge’s conclusions to the contrary are simply wrong.

IV. RESPONDENTS ARE NOT A SINGLE EMPLOYER¹⁸

The test for single employer status is well-established and purports to examine the entire factual context of the relationship between two entities:

In determining whether two nominally separate employing entities constitute a single employer, the Board examines four factors: (1) common ownership, (2) common management, (3) interrelation of operations, and (4) common control of labor relations. No single factor is controlling, and not all need be present. Rather, single-employer status ultimately depends on all the circumstances. It is characterized by the absence of an arm's-length relationship among seemingly independent companies. *Bolivar-Tees, Inc.*, 349 N.L.R.B. No. 70, slip op. at 1 (2007); *Mercy Hospital of Buffalo*, 336 N.L.R.B. 1282, 1283–1284 (2001); and *Dow Chemical Co.*, 326 N.L.R.B. 288 (1998).

Climato Brothers, Inc , 352 N.L.R.B. 797, 798 (2008). “[C]ommon ownership alone does not establish a single-employer relationship.” *Id.* “Common management exists where one of the nominally-separate enterprises exercises actual or active control, as distinguished from potential control, over the other's day-to-day operations. *See Dow Chemical Co.*, *supra* at 289. Accord: *Grass Valley Grocery Outlet*, 332 N.L.R.B. 1449, 1450 (2000).” *Id.* “The Board has generally held that **the most critical factor** is centralized control over labor relations. Common ownership, while significant, is not determinative in the absence of centralized control over labor relations.” *Mercy*

¹⁸ See Respondents’ Exceptions #77-100.

Hospital of Buffalo, 336 N.L.R.B. at 1284 (emphasis supplied). In fact, the Board has held that common ownership in the form of a parent-subsidary relationship “indicates only **potential** control over the subsidiary by the parent entity ... [and] ‘a single employer relationship will be found **only** if one of the companies exercises actual or active control over the day-to-day operations or labor relations of the other.’” *Mercy General Health Partners*, 331 N.L.R.B. 783, 784-785 (2000)(quoting *Dow Chemical Co.*, *supra*) (emphasis supplied).

Respondents have acknowledged the obvious: that there is common ownership between them and common management at the executive level; in fact, the Judge provided exhaustive detail of the overlap and other relationships. ALJ Decision at 40-44. The bulk of the General Counsel’s evidence, however, was directed to the period of the acquisition of the Laurel Crest facility and the initial staffing of senior management of the operation that became Cambria Care Center – to a time, in other words, when there were no day-to-day operations because the facility was not yet operational and before it was actually owned by the common owner. The General Counsel’s approach focuses on the obvious – who else but the organizers of the corporation are responsible for the initial staffing and financing of that corporation? The management team at Cambria Care Center was not capable of hiring itself, and given the fact that Cambria Care Center had to be completely operational with a full complement on January 1, 2010, and that its management and supervisory personnel were largely if not exclusively employed by the County (with professional obligations to the County through the end of the year), no obvious alternative method of staffing the facility is apparent.

The Judge dismisses these observations as “glib”, ALJ Decision at 53, and attempts to refute them with *non sequiturs*. He first states that “independent enterprises typically – not unusually – hire their own employees, set their own wages, choose their own benefit plans, *etc.*”

Id. There is no support in the record for his observation, but more importantly, he misses the point; the issue is not whether Grane Healthcare Co. and Cambria Care Center are “independent” (they are not), but whether they constitute a “single employer” within the meaning of the Act. The Judge’s observations of “what Grane could have done”, *id.* at 53-54, avoid addressing the real issue of how what was actually done negates separate employer status under the Act. He further dismisses Larkin’s “frequent and purposeful description of the facility as ‘my facility’” as “slanted toward evincing his authority over Cambria Care [Center] ...,” *Id.* at 55 n.54, yet acknowledges that Larkin is not a figurehead: “He does a lot. He is the administrator of the facility, no less but also no more.” ALJ Decision at 55. Apparently, no witness is credible unless he admits to the claims made by the General Counsel.

In fact, the Judge concluded:

Most generally stated, the record overwhelmingly supports the conclusion that the financial administration of the facility is wholly in the hands of Grane consultants and officials. Larkin [the Administrator of Cambria Care Center] is largely ignorant of these aspects of the operation. He is more involved in staffing and labor relations issues, but is heavily reliant of the assistance of the Grane consultants.

ALJ Decision at 49. The Judge went on to detail, among other things, the uncontroverted testimony that Larkin was solely responsible for hiring decisions at the facility, for revising and implementing the job descriptions, for implementing a monthly employee recognition program, for revising and implementing the employee handbook, and for implementing a voluntary training program for LPNs in the establishment and maintenance of intravenous lines. *Id.* at 49-51. In short, according to the Judge, while Larkin was uninvolved with the financial business of Cambria Care Center, he was intimately involved with the “day to day” operations, especially as those operations impacted on the employees.

What was missing from the General Counsel's case, because it is in fact not the case, is proof that Grane Healthcare exercised "actual or active control of the day-to-day operations or labor relations" of Cambria Care Center after the facility was operational. In the absence of such proof, which is "critical" to the single employer determination, Grane Healthcare and Cambria Care Center cannot be a single employer.

The evidence at trial showed without contradiction that once Owen Larkin was selected as the Administrator of Cambria Care Center he became responsible for its day-to-day operations and not "beholden" to anyone at Grane Healthcare. Although he reports to Len Oddo, who serves the dual role as Grane's Vice President of Operations and also as a Vice President of Cambria Care Center, *see* GCX 4 & GCX 11, the evidence demonstrates that Larkin's autonomy was established from the beginning: Item 4(c) on the application submitted to the Commonwealth of Pennsylvania to obtain the nursing home license for Cambria Care Center identifies Larkin as the prospective Administrator of the facility "who will have responsibility of day-to-day operations and who will provide immediate direction and control over the manner of delivery of health care services to individuals served by the health care facility."

The Judge agreed that Larkin is no figurehead; his credentials and experience demonstrate real ability to exercise the authority that he possesses. *E.g.*, Tr. Vol. VI at p. 1054, 1055-1056. *See also* GCX 13 (Larkin's resumé). Larkin's authority at Cambria Care Center is real. He participated in the decisions about the hiring of his management team. He was consulted by Beth Lenge of Grane Healthcare for recommendations about the department heads who would lead the operational departments at Cambria Care Center. Every one of the people he recommended was hired. *Id.* at 1066-1067. Larkin is responsible for the day-to-day operations of Cambria Care Center's 18 operational departments. *Id.* at 1067. Since January 1, 2010 – the day that Cambria

Care Center commenced operations – Larkin has been responsible for hiring all employees at the facility. *Id.* at 1071. His description of the hiring process for the 110 or so employees hired by Cambria Care Center since January 1 (there is a lot of turnover) shows that Grane Healthcare is not involved at all in the hiring decisions; Larkin’s management staff at Cambria Care Center interviews and selects from among the applicants. *Id.* at 1073-1076. Other than forwarding applications it receives in response to notices of job openings advertised on Grane’s website, no one from Grane Healthcare, or any other entity recommends, assists, or decides who gets hired at Cambria Care Center for any position; only Larkin has authority to make those decisions. *Id.* at 1077.

The labor relations policies implemented at Cambria Care Center are solely Larkin’s responsibility. He rewrote extensive portions of the Employee Manual (GCX 52) that was implemented in late January, 2010, including revising the absenteeism policy to make it more restrictive. Larkin determined on his own both to make the revisions to the Manual and to implement it. *Id.* at 1080-1081. As of the time of the hearing, he had begun the process of revising the existing job descriptions to more closely comport with his view of the way those jobs should be performed at Cambria Care Center, as for example with the Maintenance job descriptions that were finalized the week of the reconvened hearing. *Id.* at 1086-1087; RX 8 & 9. In fact, it was stipulated by all parties that the job descriptions put into effect at Cambria Care Center by Larkin were all prepared in similar fashion: a template provided pursuant to the management contract with Grane Healthcare was circulated by Larkin to his department heads, substantive comments were made and incorporated into the final description. No one from Grane Healthcare played any role in this process. Tr. Vol. VI at 1091-1095 and RX 10-14 & 17-21. The same process and autonomy will prevail with respect to Larkin’s review and eventual

implementation of the job descriptions applicable to the Nursing Department. Tr. Vol. VI at 1107-1110 and RX 22-28.

In short, it is apparent from Larkin's uncontradicted testimony that he considers the operation of Cambria Care Center to be his responsibility and no one else's – certainly not Len Oddo's or Beth Lenge's. The facility's license to operate as nursing home is in his name, and that fact carries significance:

[With] My responsibility as the administrator, I have complete responsibility for the health and welfare of over 250 of the infirmed [sic] and aged in this community. The Department of Health requires very few things on the wall, when you walk in; the occupancy permit, the Medicare/Medicaid service license, and my license. That is an extremely serious thing. The performance in the building is a direct relationship to me, and the performance of my duties in that license, my license is on the line, and on the wall, for the building and the business.

Id. at 1127.

Larkin's testimony and approach to the day-to-day management is borne out by the Management Agreement, GCX 20, between Grane and Cambria Care Center. The Judge discounts its significance, but only because he concludes that it shows that Grane contracted "essentially with itself, to provide management assistance for an entity it created." ALJ Decision at 57 n.57. His conclusion is circular and is belied by the terms of the document: the "General Policy" stated in the Management Agreement is that the "Operator [Cambria Care Center] shall retain authority to establish general business policy." GCX 20 at §1.2, p. 1. This authority is confirmed in subsequent sections of the document as well as by Larkin's testimony. *See, e.g.*, §1.2.1 ("Operator [Cambria Care Center] shall determine staffing requirements, wage and salary scales, employee benefits and general personnel policies"); §1.2.1 (Operator makes "final determination" with respect to employment terminations); §2.1.2 (Operator must approve

proposed changes to patient charges); §2.1.4 (Operator must approve physical repairs costing more than \$2,500); §2.1.9 (Operator must approve all professional service contracts); §3.6 (Operator “shall have right to withdraw funds for any purpose on its signature alone” for operating expenses and capital expenditures); §4.3 (Operator must approve any legal contest or appeal). Of course, given that Cambria Care Center has been operational for much less than a full year, there is no evidence available about Larkin’s exercise under the Management Agreement of a number of his rights as Administrator of the facility, but his testimony is undisputed with respect to his exclusive ability to hire and fire (§1.2.1), to spend money on operating and capital expenses (§3.6) and the establishment of personnel policies (§1.2.1) and there was no evidence presented by the General Counsel, the SEIU or Local 1305 that his managerial autonomy will not continue.

V. CONCLUSION

The Board in the recently issued *Specialty Healthcare and Rehabilitation Center* decision has again acknowledged its healthy practice of continuing to “evaluate whether its decisions and rules are serving their statutory purposes.” Such evaluation is warranted with respect to the application of *Burns/Fall River* successorship principle to the transactions from public entities to private employers. The Act’s purposes are not well-served by embroiling employees, employers or labor organizations in disputes for which the preferred resolution has been for many years the secret ballot. Respondents urge the Board to reverse the Judge and to find that they have no duty to bargain with Local 1305.

With respect to the claims under Section 8(a)(3), the record does not support the Judge’s conclusion that the decisions not to hire Lamer, Billy, Weber, Mulhearn and Hagerich were improperly motivated. The Judge dismissed without sufficient reason uncontroverted evidence, and ignored corroborating evidence supporting Respondents’ position. His conclusions must be

reversed, and the Section 8(a)(3) claims dismissed.

Finally, Respondents are not a single employer. Cambria Care Center management is responsible for the day-to-day operations at the facility, and there can be no finding of single employer as a result.

Dated: January 28, 2011

Respectfully submitted,
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of **Respondents' Brief in Support of Exceptions** was served on the below-listed this 28th day of January, 2011 via electronic filing:

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